STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 16, 2009
v	No. 282483 Wayne Circuit Court
DEANTE HAWKINS, Defendant-Appellant.	LC No. 06-013493-FC

Before: Zahra, P.J., O'Connell and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), assault with intent to rob while armed, MCL 750.89, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

I. Basic Facts

Defendant's convictions arise from the robbery of Milt's Barbecue in Detroit. Milton Goodson, the owner of the restaurant, was shot and killed during the robbery. An employee, Ashley Taylor, identified defendant as the person who robbed the restaurant and shot Goodson. Another restaurant employee, Jeffrey Gaskin, was also charged in the incident and pleaded guilty to second-degree murder pursuant to a plea agreement. Gaskin implicated defendant in the offense, identifying him as the robber. The defense theory at trial was mistaken identity.

II. Ineffective Assistance of Counsel

Defendant first argues that defense counsel was ineffective. Because defendant did not raise his ineffective assistance claim in a motion for a new trial or request a *Ginther*[1] hearing, our review is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To justify reversal a defendant must show that (1) counsel's performance was

[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

deficient, such that his "performance fell below an objective standard of reasonableness under the prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). To meet this second requirement, a defendant must show that the error was so serious that the defendant was deprived of a fair trial. *Id*. In addition, a defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

A. Failure to Strike Prospective Juror

Defendant first contends that counsel was ineffective for failing to use a peremptory challenge to excuse an allegedly biased juror. We disagree. Generally, this Court has been reluctant to find ineffective assistance based on an attorney's failure to challenge a potential juror. *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008). This is because this Court is incapable of seeing the potential jurors and hearing their answers to questions posed at voir dire; and, the decision to accept or reject a potential juror is purely a matter of trial strategy, which is often based on these non-verbal cues. *Id*; *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 229 (1986). Defendant has not provided any reasons why we should stray from these guiding principles in his particular case.

In the present matter, juror number nine stated that her first cousin had been murdered approximately four months earlier and that the person who was charged with the offense had gone to trial, but had "got[ten] away with it." However, the juror indicated that she could listen to the evidence with an open mind and be fair and impartial to both sides. Upon further questioning by the court, the juror also indicated that she was able to separate the prior incident from the present case, and decide the case solely on the evidence presented at trial. On the basis of trial counsel's experience, and the juror's response, counsel could have reasonably believed that he had attained a "reasonable, fair, and honest jury." *Unger*, *supra* at 258. In such instances, "[w]e will not substitute our judgment for that of defendant's counsel, nor will we use the benefit of hindsight to assess counsel's performance." *Id.* Defendant has failed to overcome the presumption that counsel's decision not to strike the prospective juror constituted sound trial strategy.

B. Failure to Provide a Defense

Defendant next contends that counsel was ineffective for failing to provide a substantive defense by failing to call him to testify and failing to call any other witnesses. We cannot agree. The decision whether to call witnesses is presumed to be a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). The failure to call witnesses constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Here, defendant expressly indicated at trial that he did not want to testify. Defendant does not explain on appeal what testimony he could have offered in his own defense. Nor does defendant list what other witnesses were available to testify, nor explain how their testimony could have aided his case. As such, there is no basis for us to conclude that counsel's actions deprived defendant of a substantial defense. For all of the foregoing reasons, defendant's claim of ineffective assistance of counsel lacks merit.

III. Right to Confrontation

Next, defendant argues that out-of-court statements were improperly admitted at trial, in violation of his constitutional right of confrontation. We disagree. Although defendant raised a hearsay objection at trial, he did not object to the testimony on Confrontation Clause grounds. "[A]n objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). Therefore, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. This clause bars "admission of *testimonial* statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (emphasis added). Thus, the Confrontation Clause is not implicated unless the statements of a declarant are testimonial. *Davis v Washington*, 547 US 813, 821; 126 S Ct 2266; 165 L Ed 2d 224 (2006); *People v Taylor*, 482 Mich 368, 377-378; 759 NW2d 361 (2008). This is because only testimonial statements cause the declarant to be a "witness" within the meaning of the Confrontation Clause. *Davis*, *supra* at 821. "It is the testimonial character of a statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Id*. "Testimonial" statements include prior trial testimony, pretrial statements that the declarant could reasonably expect to be used in a prosecutorial manner, and statements made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *People v Jambor (On Remand)*, 273 Mich App 477, 487; 729 NW2d 569 (2007) (citation and quotation marks omitted).

In this case, a witness testified that a couple of days after the offense, two men informed her that they wanted to search her backyard for some keys.[2] The alleged statements of the two men did not involve prior trial testimony, nor were they made under circumstances in which the declarants reasonably would expect their statements to be used in a prosecutorial manner or would be available for use at a later trial. Thus, the statements are nontestimonial and they do not implicate the Confrontation Clause. Accordingly, the court's decision to permit these statements did not constitute plain error.

[2] We note that these statements do not qualify as hearsay, as they were not offered to prove the truth of the matter asserted. MRE 801(c). Thus, there was no error in the court's decision to permit the testimony over defendant's objection.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly